THE PROBLEM OF THE DISPOSITION OF INSANE CRIMINALS.

THE original subject of this paper was: "The Problem of the Criminal Insane." I soon found, however, that it would be quite impossible to give even an intelligent outline of the subject within the limits proper to the occasion. Accordingly, I have decided to restrict the subject to a consideration of the question of the disposition of those insane persons who have come within the jurisdiction of the criminal law.

In the beginning let us define the terms which we shall use. Of course, it is familiar knowledge that the concept of insanity defined from a medical standpoint is far broader than that of insanity in its legal relations. In the view of the physician insanity is any departure from the normal mental function. As was said by Messrs. Witthaus and Becker:

> "Clinically, insanity is a disturbance of self-consciousness, and is dependent upon disease of the cerebro-spinal system. The object of the study of insanity is to discover the conditions under which physical function of mental action departs from the normal, and to learn the method by which this function may be restored. Brain affections with predominating disturbance of mental function are called diseases of the mind." [1]

On the other hand, in its legal aspect the term "insanity" is restricted to that form of mental disorder which renders the person irresponsible for his acts. As was said by Bucknill in his treatise on insanity in its legal relations:

> "It is a trite but a most important observation, that in the question of what constitutes insanity the members of the two great and learned professions of law and medicine entertain essentially different and seemingly irreconcilable views, and that on the question of the irresponsibility of criminals, who are supposed to be insane, there is still a wide chasm of difference of opinion between them. To

[1] 3 Medical Jurisprudence, 159.

a certain extent this is true, and perhaps inevitable; and the reason of it is not difficult to find,—that the two professions have to regard insanity and to deal with the insane with different aims and purposes. The physician has to prevent or cure it, and to him, therefore, the whole and especially the early history of the patient, embracing the causes and the development of the changes, bodily and mental, and affording perhaps some insight into the pathology, is of preponderating importance. With him the main question is to prevent its interference with the enjoyment and duration of the life of the patient.

"*To the lawyer* it matters not how the seed of insanity *was* sown, nor the growth of the plant, except as confirmatory evidence that the plant is there. With him the sole question is *its existence, its degree, and its influence on the conduct,* not therefore a medical but a moral one; and if the same mental states were capable of being produced by other conditions than disease, the same amount of irresponsibility would, I think, be recognized, as indeed is the case for children under seven years of age, in whom the law refuses to recognize the responsible knowledge of right and wrong." [2]

We next come to the consideration of the vexed question as to what degree of insanity will justify a decision that an insane person is not responsible for an act which would be a crime if he were sane. The rule governing this point in England and in this country was first clearly laid down in 1843 in McNaghten's Case.[3] This unfortunate man was laboring under an insane delusion that Sir Robert Peel had injured him, and, mistaking a Mr. Drummond for Sir Robert Peel, he shot Mr. Drummond dead with a pistol. He was tried before a distinguished court (Tindal, C. J., Williams, J., and Coleridge, J.) and was acquitted. The case, of course, caused much comment, and the House of Lords put certain questions to the judges and received from them in June, 1843, certain answers upon the subject of insane delusions. These questions were not put in regard to any matter which was judicially before the House of Lords, and the authority of the House to put the questions under

[2] 3 Medical Jurisprudence, 156.
[3] 10 C. & F. 200.

the circumstances is more than doubtful. However, they were put and answered. One of these questions was as follows:

"In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?"

To this question the judges answered:

"We submit our opinion to be that the jury ought to be told in all cases that every man is presumed to be sane and to possess a sufficient degree of sound reason to be responsible for his crimes until the contrary be proved to their satisfaction. That to establish a defense on the ground of insanity it must be clearly proved that at the time of committing the act the accused was laboring under such a defective reason from disease of the mind as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."

This language is preserved substantially unchanged in our present law, which provides in § 1120 of the Penal Code as follows:

"An act done by a person who is an idiot, imbecile, lunatic or insane is not a crime. A person can not be tried, sentenced to any punishment or punished for a crime while he is in a state of idiocy, imbecility, lunacy or insanity so as to be incapable of understanding the proceeding or making his defense.

"A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as:

"1. Not to know the nature and quality of the act he was doing; or,

"2. Not to know that the act was wrong."

And in all the States the rule is in effect the same. As was said by Messrs. Witthaus and Becker:

"All countries agree in absolving from responsibility for criminal acts any one who is mentally unsound. According to the German law, a crime is not counted such when the doer at the time is unconscious, or is deprived of his free will by disease of the mind. Austrian law defines an act as not

> criminal when the doer is unconscious, or when his will is affected, or the character of the act not perceived. The French law is virtually the same."

We come now to the particular subject under consideration: How should insane criminals be punished? There are two classes of insane criminals. There are those who have been found to be insane at the time of the commission of the crime. Then there are those who, having been convicted of crime, afterwards become insane while undergoing punishment.

As to the latter class, there is in theory no difference between their treatment and the treatment of those lunatics who have not been convicted of crime. It is provided by statute in this State, and we suppose in all States and in all countries, that if a prisoner under criminal conviction becomes insane, the fact of his insanity must be ascertained by some legal procedure and he shall then be transferred to a proper asylum. Of course, such lunatics who have already shown criminal tendencies are more likely to be dangerous and difficult of treatment than the ordinary insane; and consequently, as a matter of convenience, they are usually transferred to the same asylum as that in which the prisoners who have been found insane at the time of the commission of a crime are detained. For example, in this State, if a convict at Sing Sing becomes insane, he is transferred to the State Hospital for the Criminal Insane at Matteawan. The disposition of such lunatics involves no peculiar difficulty. They are confined in the insane asylum until they recover, and when that event takes place they are transferred back to the prison, there to complete the term of imprisonment to which they may have been sentenced.

It is as to the former class of insane criminals—those who have been found to be insane at the time of the commission of the act or crime for which they have been tried—that problems arise which are most difficult of solution.

We must consider, first, the nature of the punishment which should be inflicted upon the person who, in a state of insanity, has committed a crime. To do this it is necessary to bear in mind the reasons for and the purposes of the infliction of punishment upon individuals for crime.

Sir James FitzJames Stephen, in his History of the Criminal Law of England, states with characteristic severity his view as to the objects of punishment. He says:

> "I think it highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it. * * *
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> "Another object is the direct prevention of crime, either by fear, or by disabling or even destroying the offender; and this which is, I think, commonly put forward as the only proper object of legal punishments is beyond all question distinct from the one just mentioned and of co-ordinate importance with it."

This view, however, is quite opposed to the modern spirit of dealing with this question. The doctrine now generally held is well set forth in Mr. Wharton's work on Criminal Law.[4] He maintains that punishment is an act of retributive justice, to which reformation and example are incidental. This theory, according to Mr. Wharton, rests on the assumption that crime as crime must be punished. *Punitur quia peccatum est.* He claims, and in my opinion justly, that such punishment properly administered will bring about both the prevention of further crimes and the reformation of the offender.

How, then, shall we administer penal discipline to a person more or less insane at the time of the commission of the crime with which he has been charged? It is obvious that the answer to this question will depend upon the degree of insanity or mental disturbance accompanying the criminal act.

A person who is a lunatic with lucid intervals may be tried and convicted during a lucid interval for a crime committed in the same or a prior interval of sanity.[5] Thus a person, although a lunatic, may be held criminally responsible, if the offense is committed in a lucid interval. So also a person who is partially insane may be tried and convicted of a crime, even though it

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[4] 1 Wharton, Criminal Law, 11 ed. 11.

[5] 5 Clark's Case, 1 City Hall Recorder 176.

was committed at a time when his mind was affected by this partial insanity. As was said by our Court of Appeals in People *v.* Taylor:[6]

> "Partial insanity or incipient insanity is not sufficient, if there is still the ability to form a correct perception of the legal quality of the act and to know that it is wrong."

Of course, if there is complete insanity, the lunatic is not responsible. Of this complete insanity perhaps epileptic mania is the typical case. In cases of this disease there is sometimes a blind fury and violence, often resulting in murder; and during the paroxysm the unfortunate patient is entirely unconscious, so that upon recovery he cannot recall what he has done during the interval of madness.

It will be seen, therefore, that an insane person who has committed an act which in a sane person would be a crime may have done so either in a lucid interval, or while partially insane, or while totally insane. It is obvious that there is a different degree of moral responsibility attaching to each one of these three conditions, and that a different disposition of the individual in question is indicated in each case. Nevertheless, our law allows no verdict in a criminal case in which insanity is interposed as a defense except guilty or not guilty. If the person is insane within the definition of § 1120 of the Penal Law at the time the crime was committed he must be acquitted. If he be not insane at that time within that definition, he must be convicted. Our statute[7] provides:

> "When the defense is insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state the fact with their verdict. The court must thereupon, if the defendant be in custody and they deem his discharge dangerous to the public peace or safety, order him to be committed to the state lunatic asylum until he becomes sane."

That course was followed in the case of Thaw, who was acquitted on the ground of insanity but committed by Mr. Justice

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[6] 138 N. Y. 407.

[7] Code of Criminal Procedure, § 454.

Victor J. Dowling, who presided at his trial, to the Matteawan State Hospital until he should become sane. It was afterwards held by our State Supreme Court and our Court of Appeals that this action was legal and that the judge who presides at a trial has the power to commit a person acquitted on the ground of insanity without making any further inquiry as to his sanity or insanity at the time of the rendition of the verdict of the jury. In other words, if the jury find that the defendant is not guilty on the ground of insanity, then the court has the power to commit him to an insane asylum without conducting any separate or additional proceeding to ascertain his sanity or insanity at the time of the acquittal.

But it is obvious that this is an unscientific method of disposing of these cases. It may frequently happen that a man is partially insane to such an extent that he should not receive the full penalty of the law, and at the same time is sufficiently sane to know the nature of his act and to know that it is wrong. In other words, there is a wide twilight region between the noonday of sanity and the midnight of complete insanity.

In my opinion the law should be amended so as to recognize these conditions and to provide that a person who is partially insane, but still competent to know the nature of his act and to know that it is wrong, should be convicted but should not be punished as a sane convict. This amendment of the law would, in my judgment, not only prevent many instances of inhumanity, in which weak-minded and even insane persons have been convicted of crime and sentenced as if they were fully responsible; but, on the other hand, it would prevent many miscarriages of justice, because it would enable a jury to convict and yet to recommend to the court that the defendant be not held fully responsible, but be punished as a person only partially responsible for his crime.

The wonderful mind of Sir James FitzJames Stephen clearly perceived the distinction which I have attempted to indicate. He says in his History of the Criminal Law: [8]

"Diseases of the brain and the nervous system may in any

[8] 2 Stephen, Criminal Law 174.

one of many ways interfere more or less with will so understood. They may cause definite intellectual error, and, if they do so, their legal effect is that of other innocent mistakes of fact. Far more frequently they affect the will by either destroying altogether, or weakening to a greater or less extent, the power of steady, calm attention to any train of thought, and especially to general principles, and their relation to particular acts. They may weaken all the mental faculties, so as to reduce life to a dream. They may act like a convulsion fit. They may operate as resistible motives to an act known to be wrong. In other words they may destroy, they may weaken, or they may leave unaffected the power of self-control.

"The practical inference from this seems to me to be that the law ought to recognize these various effects of madness. It ought, where madness is proved, to allow the jury to return any one of three verdicts: Guilty; Guilty, but his power of self-control was diminished by insanity; Not guilty on the ground of insanity."

As to that class of cases in which a person who is a lunatic should, nevertheless, be convicted as if he were sane, the rule already mentioned, which holds responsible a lunatic who kills another in a sane interval, recognizes the fact that a lunatic may be convicted of a crime as if he were sane. Also, we may suppose cases in which a man, although insane, nevertheless is mentally competent to commit a crime, having the power to will the commission of the crime and the knowledge that it is wrong. Sir James FitzJames Stephen gives the following illustration:[9]

"Suppose a case in which there is no delusion at all, and no connection at all between the madness and the crime. For instance, there are two brothers, A and B. A is the owner of a large estate, B is his heir at law. B suffers to some extent from insanity, and is under care at a private lunatic asylum, where his disease is going off and there is every prospect of his cure. A comes to see him; and B, who knew of his intention to do so, and who apart from his madness is extremely wicked, contrives to poison him with every circumstance of premeditation and deliberation, managing artfully to throw the blame on another person who is hanged. B completely recovers and inherits the estate.

[9] 2 Stephen, Criminal Law 176.

> Why, when the truth comes to light, should not B be hanged? His act, by the supposition, was in every respect a sane one, though he happened to be mad when he did it. The fact that he was mad ought to be allowed to be relevant to his guilt, and to be left to the jury as evidence as far as it went in favor of a verdict of not guilty on the ground of insanity, or (if such a verdict were permitted by law) guilty, but the prisoner's power of self-control was weakened by insanity; but if the jury chose to find such a man guilty simply, I think they would be well warranted in doing so, and, if they did, I think he ought to be hanged."

As to the second verdict which Mr. Justice Stephen suggests —Guilty, but his power of self-control was diminished by insanity—we can readily see that such a verdict would be appropriate in many cases of partial or incipient insanity or imbecility. As to the punishment of those who may be convicted under this verdict, the views of Mr. Justice Stephen are interesting: [10]

> "It may, however, be asked how ought they to be punished? Ought they to be punished in all respects like sane people? To this I should certainly answer: Yes, as far as severity goes; no, as far as the manner of punishment goes. The man who though mad was found guilty, without any qualification, of murder I would hang; but if the jury qualified their verdict in the manner suggested in respect of any offender, I think he should be sentenced, if the case were murder, to penal servitude for life, or not less than say fourteen years, and in cases not capital to any punishment which might be inflicted upon a sane man. As to the manner of executing the sentence, I think there ought to be special asylums, or special wards in the existing asylums, reserved for criminal lunatics, in which they should be treated, not as innocent lunatics are treated, but as criminals, though the discipline might be so arranged as to meet the circumstances of their disorder. At present, by an arrangement which appears to me to be nearly as clumsy as that of pardoning a man convicted of crime on the ground of his innocence, persons acquitted of crimes on the ground of insanity are confined in an establishment described by parliament as 'an asylum for criminal lunatics.' To this asylum, moreover, 'any person sentenced or ordered to be kept in penal servitude, who may be shown to the satisfaction of the Sec-

[10] 2 Stephen, Criminal Law 180.

retary of State to be insane, or to be unfit from imbecility of mind for penal discipline,' may be removed; so that a person otherwise inoffensive, who, under the influence of the blind fury of epilepsy, has unconsciously killed another, is forced to associate with the vile criminal whose vices have at last made him too mad for a convict prison, and, what is more, both are treated in the same way. The man who is acquitted on the ground of insanity and the man who is convicted but found to have been under the influence of insanity to some extent ought, I think, to be separated, and submitted to different kinds of discipline."

And he says concerning the third verdict:[11]

"As to the verdict of not guilty on the ground of insanity, the foregoing observations show in what cases it ought in my opinion to be returned; that is to say, in those cases in which it is proved that the power of self-control in respect of the particular act is so much weakened that it may be regarded as practically destroyed, either by general weakening of the mental powers, or by morbid excitements, or by delusions which throw the whole mind into disorder, or which are evidence that it has been thrown into disorder by disease of which they are symptoms, or by impulses which really are irresistible and not merely unresisted."

And Mr. Justice Stephen closes with a very sensible observation on the conduct of juries in criminal cases in which the defense of insanity is interposed. He says:[12]

"The importance of the whole discussion as to the precise terms in which the legal doctrine on this subject is to be stated may easily be exaggerated, so long as the law is administered by juries. I do not believe it possible for a person who has not given long-sustained attention to the subject to enter into the various controversies which relate to it, and the result is that juries do not understand summings up which aim at anything elaborate or novel. The impression made on my mind by hearing many—some most distinguished—judges sum up to juries in cases of insanity, and by watching the juries to whom I have myself summed up on such occasions, is that they care very little for generalities. In my experience they are usually reluctant to

[11] 2 Stephen, Criminal Law 182.

[12] 2 Stephen, Criminal Law 185.

> convict if they look upon the act itself as upon the whole a mad one, and to acquit if they think it was an ordinary crime. But their decision between madness and crime turns much more upon the particular circumstances of the case and the common meaning of words, than upon the theories, legal or medical, which are put before them. It is questionable to me whether a more elaborate inquiry would produce more substantial justice."

The foregoing is a hasty outline of some proposed changes in the method of determining the responsibility of insane criminals and the consequent disposition of their cases. There would be, I think, several beneficent results from this change.

In the first place, a person convicted of crime, even though insane, would be detained as a criminal and not as a lunatic. Secondly, he would not have the privilege of suing out successive writs of *habeas corpus* in an attempt to prove that he had become sane. He would have to remain in prison until his term should have expired. It would then become necessary to determine whether he was sane enough to be discharged, and proper legal procedure should be provided for that purpose. Also, as I have indicated above, I believe that juries would be far more willing to convict in cases of crime committed by persons of insane mind although with sufficient sanity to be legally and morally responsible. There is no doubt that in many such cases under our present law acquittals occur which are miscarriages of justice.

And under the law amended as I have suggested, a person who was legally and morally irresponsible by reason of insanity would be saved from the stigma of a conviction and would yet be restrained of his liberty for the protection of the public. Of course, in such event, the detention of the individual is not for his punishment, but for the protection of others and incidentally for his own treatment. And such detention is authorized by the police power of the State. As was said by Mr. Justice Jenks in one phase of the Thaw litigation:

> "Such a commitment is not for the punishment of such a defendant, for there can be no punishment for him who has been acquitted, but it is for protection of the public, made in the exercise of the police power of the State, which permits the restraint of an insane person who at large would

> be a danger to the peace and safety of the people. The commitment can last only so long as the defendant is insane, and he has the right at any time under the law to have his sanity determined upon habeas corpus."[13]

But under the amendments which I have suggested, the individual would be acquitted on the ground of insanity only where the insanity was complete or very nearly so. In such cases there would be, I imagine, a complete recovery only infrequently, so that the discharge of a person so acquitted would not be a common event, but would be rather extraordinary.

To recapitulate, I believe that the law should be so amended as to provide that persons, even though insane, who have committed crime in a lucid interval could be convicted; and, if insanity is only partial, they should still be convicted but under a verdict stating that, in the opinion of the jury, their power of self-restraint was weakened by mental disease; while those whose power of self-control had been practically destroyed should be acquitted.

The insane persons convicted of crime should be treated as criminals, but the fact that they are also insane should be recognized; and, although they should be confined for definite terms, they should be treated for the mental diseases from which they suffer.

On the other hand, those acquitted on the ground of insanity should be confined and treated as lunatics, not as criminals, and should be discharged upon proof of recovery to such an extent that their liberation would not endanger the public safety.

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[13] People ex rel. Peabody *v.* Chanler, 133 N. Y. 162.